NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,
 	
        Plaintiff and Respondent,
 	
v.
 	
DONALD COLIN,
 	
        Defendant and Appellant.
	E067247
	
	(Super.Ct.No. RIF1502216)
	
	OPINION

APPEAL from the Superior Court of Riverside County. Steven G. Counelis, Judge. Affirmed in part; reversed in part with directions.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting, Tami Falkenstein Hennick and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Donald Colin was upset when the manager of the Santa Cruz Inn (the Inn), Mageneran Govender, required a deposit in addition to the rate to rent a room for the night. Defendant left the Inn and went across the street, yelling at Govender and the Inn's maintenance man and security guard, Rene Rodriguez, that they were "fucking Muslims." Govender yelled back and defendant approached them. Defendant stabbed Govender in the neck. Govender tried to punch defendant but was too weak. He got up to run away and defendant stabbed him in the back. Defendant then chased after Rodriguez and eventually stabbed him in the shoulder. Defendant testified that he never stabbed either of the two men and that Rodriguez hit him with a baseball bat.

Defendant was found guilty of two counts of assault with a deadly weapon, a knife, against Govender (count 1) and Rodriguez (count 2). (Pen. Code, § 245, subd. (a)(1)).[1] The jury also found true the allegation that defendant caused great bodily injury on Govender (§ 12022.7, subd. (a)).[2] Prior to trial, after he waived his right to a jury trial, defendant admitted he had suffered two prior serious and violent felony convictions. (§ 667, subds. (a), (c) and (e)(2)(A), 1170.12, subd. (c)(2)(a)). The trial court sentenced defendant to a determinate term of 23 years plus 50 years to life to be served in state

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Defendant was additionally charged with the allegation that he committed the assault with a deadly weapon against Govender because of his race, color, religion, nationality, country of origin, ancestry and sexual orientation within the meaning of section 422.75, subdivision (a). The jury found the allegation not true. They also rejected that defendant caused great bodily injury against Rodriguez.

prison. The trial court also ordered direct victim restitution in the amount of $8,002.25 pursuant to section 1202.4, subdivision (f).

Defendant contends on appeal the trial court erred and violated his due process rights by failing to properly respond to jury questions submitted during deliberations. Further, a mathematical error in the probation report resulted in the imposition of direct victim restitution in excess of the reported victim's loss. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. <u>FACTUAL HISTORY</u>

1. *THE PEOPLE'S CASE-IN-CHIEF*

a. <u>Current Incident</u>

Sholeen Nathraj owned and managed the Inn located on Market Street in Riverside with her husband, Mageneran Govender. Rene Rodriguez worked as their maintenance man, at the front desk, and sometimes acted as a security guard. Govender and Nathraj lived onsite with their children.

On June 11, 2015, at approximately 1:00 a.m., defendant entered the Inn and asked for a room. Defendant wanted to pay cash so Govender asked for a deposit of $50 to cover any damages and the key. Defendant complained about paying the deposit. Govender told him he could not rent him the room if he did not pay the deposit. Govender escorted defendant out of the office. Rodriguez was outside in the parking lot.

Defendant walked across the street. He yelled "Fuck you, Muslim" and something like "We are going to kill you." Govender was not Muslim. He also called Rodriguez a Muslim, but he also was not a Muslim. Govender and Rodriguez walked toward

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defendant and Govender told him he was not Muslim. Defendant walked away from them. Defendant continued to yell and curse at them. Defendant eventually walked across the street and sat in front of another hotel.

Rodriguez and Govender sat outside the Inn waiting for defendant to leave. Defendant kept yelling and cursing. Govender called defendant a "fucking idiot" and asked why he was calling him a Muslim. Defendant walked fast back towards Govender and Rodriguez. Rodriguez and Govender stood up. Defendant came up to Govender and without saying a word stabbed him in the neck.[3] Govender started bleeding. Rodriguez saw the knife in defendant's hand.

Govender pushed defendant away and defendant fell on the ground. Govender tried to punch defendant while they were on the ground but defendant protected himself with a duffle bag and Govender started to get tired. Rodriguez pulled defendant away. Govender got up and tried to run away. At that point, defendant stabbed Govender in the back. Rodriguez saw Govender bleeding from the neck and the back. Govender never saw Rodriguez attack defendant; Govender never saw Rodriguez with a baseball bat.

Defendant chased Rodriguez with the knife. They ended up in the middle of the street. Defendant called Rodriguez a "fucking Muslim" and told him he was some kind of soldier. Defendant lunged at Rodriguez and stabbed him in the shoulder. Defendant said, "I got you."

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[3] Govender never actually saw a knife.

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Rodriguez was bleeding from his shoulder and was angry. Rodriguez pulled out his cell phone to call the police and defendant chased him. Defendant yelled at him that he was a "fucking rat" for calling the police.

Rodriguez told the 911 operator that a "guy" had just stabbed him in the arm. Rodriguez told the operator that defendant had come into the Inn to rent a room and then "started acting crazy." Defendant stabbed him and his boss. Defendant still had the knife in his hand and Rodriguez was bleeding. Rodriguez told the operator that defendant was chasing him with the knife. Rodriguez ran to his backyard and retrieved a bat. The police officers arrived at that time. Rodriguez set down the bat and never used it. Nathraj was in her room with her two children. She had fallen asleep but woke up to her husband yelling "help me." She went outside and saw Govender being chased by defendant, who was holding a knife.

Govender yelled to Nathraj to go back inside the hotel and call the police. Defendant started chasing Rodriguez. Defendant then said something about Govender having family in the hotel and started running toward Nathraj. Nathraj was able to make it inside the hotel. Govender also was able to get inside the hotel and told Nathraj he was having trouble breathing. Nathraj noticed a wound on Govender's neck. Govender fell to the floor. Govender had blood running down his back.

Nathraj called 911. She told the operator that a man was running around with a knife and that he had stabbed Govender in the neck and back. She reported that Govender was losing a lot of blood from the wound on his back. The 911 operator instructed Nathraj on how to stop the bleeding.

At around 2:00 a.m. on June 11, Riverside Police Officer David Cunningham went to the Inn in response to a report of a stabbing. When Officer Cunningham arrived, defendant was sitting on a curb detained by another officer. A pocket knife was lying on the ground near defendant. There appeared to be blood on the knife. The blood was still on the knife at the time of trial. Other officers were attending to Rodriguez and Govender. Both Govender and Rodriguez identified defendant as the person who stabbed them.

Defendant had a one-inch laceration on his forehead. It had to be closed with four staples at the emergency room. Officer Cunningham did not know how defendant sustained the injury.

Officer Zackowski arrived after several officers were already on scene. Defendant was already detained. Officer Zackowski spoke with Govender and Nathraj. Govender was holding a towel to his shoulder; there was a lot of blood on the towel. He had blood on his neck. Govender was speaking fast. He kept looking in defendant's direction. Govender identified defendant as the person who stabbed him. Govender advised Officer Zackowski defendant had wanted to rent a room but they argued over the price; defendant had to be escorted out; and defendant had called him a Muslim.

Nathraj told Officer Zackowski there were surveillance cameras at the Inn, but she did not have the password to access the system. While Govender remained in the hospital, the footage was accidently taped over. Govender told Officer Zackowski he hit defendant and was swinging his arms at him, but not that he repeatedly punched him.

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None of the witnesses discussed the baseball bat being used that night but Officer Zackowski did recall seeing it.

Rodriguez was interviewed at the scene. He indicated that defendant was asked to leave the Inn. Rodriguez, defendant and Govender went to the parking lot. Defendant "sucker punched" Govender in the mouth. Defendant pulled out a knife. He stabbed Govender in the back. He then chased Rodriguez and stabbed him. Rodriguez ran to the Inn and retrieved a baseball bat. He did not use it on defendant because the police arrived.

Govender was taken to Riverside Community Hospital by ambulance. He was having a hard time breathing. The stab wound to his back was so deep that it broke some ribs and penetrated his lung. He had to have surgery in order for a tube to be placed in his lung to drain fluid. After the surgery, he could not walk and was in a lot of pain. He received four stitches on his neck, six on his back and four on his chest. He was in the hospital for four days. He was bedridden for one or one and one-half weeks.

Rodriguez was also transported to the hospital. He received six to seven stitches for the stab wound to his shoulder. Rodriguez was off work for one week. Rodriguez denied that he provoked defendant during the altercation; they just wanted him to leave. Rodriguez denied that he ever touched defendant with the bat.

b. Prior Incident

On September 11, 2014, Leticia Velasco was working at a market located in San Jacinto. On that day, defendant entered the market and was cursing in Spanish and English. Defendant said to her, "Shut up, bitch. Go to your fucking country." He said in

Spanish that she should go back to Mexico. Velasco asked him to leave the market. He did not want to leave. A coworker had to physically remove defendant from the market. They struggled outside. Velasco called the police.

Defendant returned to the market. He accused them of taking his cell phone. Velasco told him they did not have his phone. Defendant walked behind the counter. He called Velasco a "wetback." Defendant walked toward her with some type of metal in his hand. He said, "if you don't give me my phone, I'll kill you." The police arrived and stopped defendant.

2.   *DEFENSE*

Defendant had prior convictions of making criminal threats and second degree robbery. Defendant entered the lobby at the Inn to rent a room but no one was in the lobby. He sat outside waiting for someone to come to the front desk when Govender and Rodriguez approached him. Defendant told them that he wanted to rent a room. Govender told defendant it would cost $120 and a $50 deposit. Defendant explained he had stayed at the hotel two months prior and only paid $78. Defendant asked why it was so much more expensive and Govender responded, "It's because of the way you look."

Defendant agreed he would pay the money but wanted a room that was dark. Govender "cocked his head back . . . with his mouth open" and defendant responded "It's not like I'm going to do drugs." Govender told him to get out. Defendant did not argue with Govender and Rodriguez, he just started to walk away. Defendant then threatened to call the health department about cockroaches being at the Inn. Govender responded, "Do it. You'll see what will happen." Defendant responded, 'Fuck you, Muslim."

Rodriguez and Govender started walking toward defendant. Rodriguez had something silver in his hand that defendant thought was a bat. Defendant walked away and they followed him. Defendant finally stopped and turned around to face Govender. He asked what they were going to do to him. Defendant was then hit on the side of the face with something silver. Defendant lost consciousness for some time and somehow ended up across the street. He collapsed onto his knees.

Defendant regained consciousness and saw Rodriguez standing over him. Govender was standing nearby. He felt liquid running down his face. He got angry and scared that they were going to attack him. Defendant grabbed a folding knife that he had in his backpack. One of the men started taking swings at him. Defendant used the butt of the knife, not the blade, to hit one of them.[4] Govender walked back to the Inn.

Rodriguez swung at defendant. Defendant tried to get away but fell on the curb with the knife still in his hand. Defendant was able to get back up and chase Rodriguez away from him. Defendant was afraid to call the police because he thought that the two men would jump him. Defendant never saw Nathraj.

Rodriguez and Govender went back into the Inn. Defendant sat outside on the curb. When the police arrived, he was sitting on the curb and his knife was next to him on the ground. He was taken to the hospital for the cut to his head. He had to have it

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[4] Defendant's testimony is not clear whether he was fighting with Govender or Rodriguez. Although it first appeared he was discussing Govender, he then denied on cross-examination that Govender ever touched him. Defendant was asked about the discrepancy. He responded that Govender never attacked him. Then he appeared to testify that he hit Govender in the cheek, and under his right arm with the butt of the knife. He later said that Govender swung at him but never touched him.

stapled shut. Defendant did not try to run from the police because he wanted to tell them his side of the story. He did not pull out the knife until after he was hit in the head.

Defendant did not recall stabbing Govender in the neck. Defendant denied that he told one of the police officers that he stabbed Govender after saying to him, "Fuck you, Muslim." Defendant was asked if he stabbed Govender after he attacked him. Defendant denied that Govender ever attacked or hit him. Defendant insisted he never stabbed Govender or Rodriguez and the blood on the knife belonged to him. Defendant claimed he was being framed and had no idea how Govender and Rodriguez received their stab wounds. He then stated that the blood on the blade of the knife belonged to Govender and Rodriguez, but the blood on the handle belonged to him.

DISCUSSION

A.   <u>RESPONSE TO JURY QUESTIONS</u>

Defendant claims the judgment must be reversed based on the trial court's inadequate response to the jury's questions during deliberations.

1.   *ADDITIONAL FACTUAL BACKGROUND*

The jury was instructed with CALCRIM Nos. 226, 3470, 3472 and 3474. CALCRIM No. 226 instructed the jury on the evaluation of witness testimony. CALCRIM No. 3470 instructed the jurors that self-defense was a defense to counts 1 and 2. They were instructed, "The defendant acted in lawful self-defense if, one, the defendant reasonably believed that he was in imminent danger of suffering bodily injury; two, the defendant reasonably believed that the immediate use of force was necessary to defend against that danger; and, three, the defendant used no more force that was

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reasonably necessary to defend against that danger." They were instructed that defendant did not have an obligation to retreat. They were also instructed that defendant only must have a reasonable belief that reasonable force was needed. Further, they were instructed "The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. If the People have not met this burden as to a particular count, you must find the defendant not guilty of that particular count."

CALCRIM No. 3472 further instructed, "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." Finally, CALCRIM No. 3474 instructed the jury, "[t]he right to use force in self-defense continues only as long as a danger exists or appears to exist. When the attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force ends."

The jury asked two questions during deliberations.[5] The jury asked "Can we still rule on self defense even if the defendant denied it was self-defense or the threat to this life?" The trial court responded, "You must consider all the evidence presented to you. Re-read CALCRIM Instructions 3470, 3472, 3474." At the same time, they also asked, "Does who started the fight have any legal implication on count 1?" The trial court responded, "You must decide the credibility of all witnesses. Re-read CALCRIM Instructions 226, 3470, 3472, 3474."

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[5] The parties and the trial court discussed the questions off the record.

2.   *WAIVER*

Initially, the People contend defendant waived this claim by failing to object to the

trial court's responses to the jury made in the lower court. A defendant forfeits a claim

that the trial court's response to the jury was inadequate or erroneous when he does not

object at trial. (*People v. Roldan* (2005) 35 Cal.4th 646, 729 ["Approval of the court's

action, even though it might have been a technical violation of section 1138 of the Penal

Code, cures any possible error"], overruled on other grounds in *People v. Doolin* (2009)

45 Cal.4th 390.) Here, the record does not establish that defense counsel objected to the

response by the trial court. Even if we were to review the claim, it lacks merit.

"When a jury asks a question after retiring for deliberation, '[s]ection 1138

imposes upon the court a duty to provide the jury with information the jury desires on

points of law.' [Citation.] But '[t]his does not mean the court must always elaborate on

the standard instructions. Where the original instructions are themselves full and

complete, the court has discretion under section 1138 to determine what additional

explanations are sufficient to satisfy the jury's request for information.' " (*People v. Eid*

(2010) 187 Cal.App.4th 859, 881-882; see also *People v. Williams* (2015) 61 Cal.4th

1244, 1267.) "Indeed, comments diverging from the standard are often risky." (*People

v. Beardslee* (1991) 53 Cal.3d 68, 97.)

We review for an abuse of discretion any error under section 1138. (*People v.

Waidla* (2000) 22 Cal.4th 690, 745-746; *People v. Eid*, *supra*, 187 Cal.App.4th at p. 882.)

Here, the trial court chose to rely on the instructions, which were full and complete

(defendant does not contend otherwise) and referred the jurors to the pertinent numbered

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instructions. CALCRIM No. 3470 clearly answered the first question of whether

defendant's testimony that he thought he was not being threatened and did not stab

Govender and Rodriguez foreclosed a finding of self-defense. The instruction directly

required the jurors to consider defendant's reasonable belief as to whether force was

required due to the two men's actions. Moreover, CALCRIM No. 3472 clearly addressed

the second question as to provocation advising the jurors that a person "does not have the

right to self-defense if he or she provokes a fight or quarrel with the intent to create an

excuse to use force." Whether this question referred to Rodriguez and Govender or

defendant, the jurors were properly advised as to the standard. The trial court did not

abuse its discretion by referring the jurors back to the instructions.

Defendant contends the jury should have been told "yes" as the answer to both

questions because the jury could reasonably infer "from all the evidence" that he acted in

self-defense in response to being assaulted first despite his testimony that he did not stab

the two men. However, the instructions advised the jurors they must look to all the

evidence and circumstances in deciding self-defense. The jury could reasonably

conclude that defendant acted in self-defense and nothing in the response foreclosed that

finding. Further, by merely saying "yes," the jury could have interpreted the response to

not require the jury to find that defendant reasonably had to believe he was in danger, but

rather could assume that he was in danger. The instructions fully explained self-defense

and no further statements by the trial court were necessary.

Defendant additionally contends the jury was confused by the burden of proof.

CALCRIM No. 3470 clearly advised the jurors that it was the People's burden to prove

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defendant did not act in self-defense. Defendant merely speculates the jurors were

confused but we must presume the jurors followed the instructions. (*People v. Boyette*

(2002) 29 Cal.4th 381, 431.)

Moreover, any possible error was harmless. The trial court's failure under section

1138 to adequately answer a jury's question is subject to the prejudice standard of *People*

v. Watson (1956) 46 Cal.2d 818, 836: whether the error resulted in a reasonable

probability of a less favorable outcome. (See *People v. Roberts* (1992) 2 Cal.4th 271,

326.)

Here, the only evidence of self-dense came from defendant's testimony. His

testimony was confusing at times. He adamantly denied stabbing Govender and

Rodriguez. However, it was clear that he did stab the two men. Govender was stabbed in

the back showing that he was retreating when he was stabbed rather than fighting with

defendant. Moreover, defendant had a history of threatening people and approaching

them with sharp objects as evidenced by his prior offense with Velasco. Strong evidence

supported that defendant did not act in self-defense.

B.   <u>VICTIM RESTITUTION FINE</u>

Defendant contends on appeal the trial court erred by relying on a miscalculation

in the probation report, which resulted in it ordering a direct victim restitution fine to

Rodriguez in the amount of $8,002.25, rather than $5,002.25, which defendant alleges

was the correct calculation of Rodriguez's claimed losses. The People concede the error.

The trial court stated prior to sentencing that it had read the probation report. The

probation report provided that Rodriguez was seeking restitution for lost wages and

medical expenses incurred as a result of the incident. The list of expenses were as follows: (1) week of wages ($400); (2) prescriptions ($26); (3) emergency room doctor billing ($596); and (4) other emergency room medical billing ($3,980.25). The total was listed as $8,002.25. The correct calculation was $5,002.25.

In sentencing defendant on the count involving Rodriguez, the trial court stated, "Restitution is ordered in the amount of $8,002.25 pursuant to the probation department report." It further ruled, "The actual victim restitution shall be paid to Rene R. through the—and the division of adult institutions shall collect that obligation, and any dispute as to the amount shall be resolved in a court hearing. The enhanced collection division is to forward these findings to the division of adult institutions. Interest shall be paid on the restitution in the amount of $10,000 per year." It stated restitution to Govender would be determined later by the probation department.

Section 1202.4, subdivision (f), the statute regulating direct victim restitution, provides in part: "Except as provided in subdivisions (q) and (r), in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court."   Section 1202.4, subdivision (f)(3) provides that to the extent possible, the restitution order "shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct, . . . "

"[W]e review the trial court's restitution order for abuse of discretion. [Citations.] The abuse of discretion standard is 'deferential,' but it 'is not empty.' [Citation.] '[I]t asks in substance whether the ruling in question "falls outside the bounds of reason" under the applicable law and the relevant facts [citations].' [Citation.] Under this standard, while a trial court has broad discretion to choose a method for calculating the amount of restitution, it must employ a method that is rationally designed to determine the surviving victim's economic loss. To facilitate appellate review of the trial court's restitution order, the trial court must take care to make a record of the restitution hearing, analyze the evidence presented, and make a clear statement of the calculation method used and how that method justifies the amount ordered." (*People v. Giordano* (2007) 42 Cal.4th 644, 651-652.)

Here, the trial court referenced the probation report in imposing the restitution fine at sentencing. However, the probation report reflected a miscalculation in the total amount of the losses reported by the victim. While this may have been merely a clerical mistake, and the trial court intended to impose only $5,002.25, we cannot state with certainty that this was the determination by the trial court. We will remand to the trial court for it to reconsider the victim restitution fine under section 1202.4, subdivision (f), make a clear statement of the calculation method used and how that method justifies the amount ordered. (*People v. Giordano*, *supra*, 42 Cal.4th at pp. 651-652.)

DISPOSITION

We reverse the victim restitution fine imposed pursuant to Penal Code section 1202.4, subdivision (f) with directions for the trial court to make the appropriate findings in accordance with this opinion. In all other respects, the judgment is affirmed.

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MILLER _____
                                                        J.

We concur:

RAMIREZ _____
                        P. J.

SLOUGH _____
                        J.

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